

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 04-109

Request for Clarification of Opinion No. 03-133 regarding Forfeitures Based on Casual Exchange of Controlled Substances

QUESTION

Does the reference to *Hughes v. Department of Safety*, 776 S.W.2d 111 (Tenn. Ct. App.), *p.t.a. denied* (1989), in Op. Tenn. Att'y Gen. 03-133 (Oct. 8, 2003), mean that conveyances used to facilitate the casual exchange of controlled substances are subject to forfeiture under Tenn. Code Ann. §53-11-451(a)?

OPINION

No. In light of subsequent statutory amendments and court decisions, the holding of *Hughes v. Department of Safety*, 776 S.W.2d 111 (Tenn. Ct. App.), *p.t.a. denied* (1989), which upheld such a forfeiture, is no longer good law. To the extent that Op. Tenn. Att'y Gen. 03-133 can be read to suggest otherwise, it is withdrawn.

ANALYSIS

The request seeks clarification of an ambiguity arising from Op. Att'y Gen. 03-133. There this office opined that a conveyance used to facilitate the simple possession or casual exchange of a controlled substance, or the distribution of one-half (½) ounce or less of marijuana, or the possession, manufacture, or delivery of drug paraphernalia, is not subject to forfeiture under the Tennessee Drug Control Act of 1989 if the conveyance is used only to facilitate these activities. *Id.*, at 1. In the analysis section of the opinion, however, the office cited *Hughes v. Department of Safety*, 776 S.W.2d 111 (Tenn. Ct. App.), *p.t.a. denied* (1989), and suggested that such conveyances may be subject to forfeiture, even in connection with small amounts, if they "can be proved by the department to have been used in something other than the mere transportation of a controlled substance." *Id.*, at 3-4 and nn. 6, 7.

There is thus some ambiguity in the opinion concerning the case in which a conveyance is used to facilitate the casual exchange of a controlled substance. Since "casual exchange" can involve a purchase and sale, a conveyance used to facilitate such an exchange has obviously been used as more than mere transportation. This is the situation considered by the court in *Hughes*. The court first looked to federal forfeiture law, which had no "casual exchange" exception, and noted there was a split in federal case law on the question whether use of an automobile to reach the scene of a drug

sale amounts to "facilitation" of the sale. The court reached the conclusion that using a conveyance to drive to the site of negotiations over purchase, to drive to another site to consummate the purchase, and to drive away with the purchased drugs did amount to "facilitation" of the "transportation, sale, and receipt" of the drugs. 776 S.W.2d at 114.

The court then considered the effect of the then-existing exception for "simple possession." The court concluded that the exception only applied "when the vehicle's only connection with the substance is as a means of transportation." 776 S.W.2d at 115. The court reasoned as follows:

Section 53-11-409(a)(4)(C) does not, however, exempt from forfeiture a vehicle that has been used to facilitate the illegal sale or receipt of a controlled substance. Thus, we are convinced that the use of a vehicle to drive to the point where an illegal sale is made and the further use to transport the controlled substance away from the point of sale will subject the vehicle to confiscation regardless of the purpose for which the controlled substance was purchased.

Id. The former Tenn. Code Ann. § 53-1-451(a)(4)(C) referred to the now-repealed Tenn. Code Ann. § 39-6-417(b), which at the time provided that it was "unlawful for any person *knowingly* or intentionally to *possess* a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription" (Emphasis added). There was no language in this statute regarding a "casual exchange," and thus no exemption from forfeiture based on a casual exchange.

Hughes was decided in March of 1989. 776 S.W.2d at 111. On November 1, 1989, the Tennessee Drug Control Act of 1989 took effect, repealing 39-6-417(b). In its place, Tenn. Code Ann. § 39-17-418(a) was passed, making it "an offense for a person to *knowingly possess or casually exchange* a controlled substance, unless the substance was obtained directly from, or pursuant to, a valid prescription" (Emphasis added). Thus, the law post-*Hughes* is that there is an exemption from forfeiture based on a casual exchange.

While the Tennessee Code does not define "casual exchange," the Tennessee Supreme Court has determined that a casual exchange occurs when the transfer of the controlled substance is made without design. *See State v. Helton*, 507 S.W.2d 117, 120, (Tenn. 1974). The transfer of the controlled substance may qualify as a casual exchange even though money is involved in the transfer. *Id.*

The sale or distribution of a controlled substance under certain circumstances can be a misdemeanor if the controlled substance was "casually exchanged." A casual exchange occurs when the transfer of the controlled substance is made without design. *State v. Helton*, 507 S.W.2d 117, 120 (Tenn.1974). The transfer of the controlled substance may qualify as a casual exchange even though money is involved in the transfer. *Id.*

State v. Carey, 914 S.W.2d 93, 96 (Tenn.Crim.App. 1995). Therefore, not every transaction for drugs is a “sale or receipt” within the forfeiture statute, and the mere presence of a misdemeanor amount of a controlled substance cannot trigger the seizure of a vehicle. As a casual exchange is not limited to transactions made without money, and since forfeiture statutes are to be strictly construed,¹ the exception to Tenn. Code Ann. § 53-11-451(a)(4) must be read to include casual exchanges which include money as well as those which do not.

After *Hughes* and before the statute was amended, this office opined that vehicles could be forfeited even when the amount of controlled substance found would only support a charge of simple possession or casual exchange. Op. Tenn. Atty. Gen. 93-46 (May 13, 1993). At that time, Tenn. Code Ann. § 39-6-417 had been repealed and the new exemption statute, § 39-17-418, was not referenced in § 53-11-451. The legislature has since amended the law to include the new location of the exception for simple possession or casual exchange. Thus, the previous opinion is no longer applicable to the situation.

Op. Tenn. Att’y Gen. 03-133 (October 8, 2003), n. 6.²

The previous opinion dealt with the overall scheme of forfeiture and the applicable exemptions. There was no distinction made between a “sale” of drugs and a “casual exchange.” As the provisions for the “casual exchange” of a controlled substance were not in the code at the time *Hughes* was decided, *Hughes* is inapplicable to them. Therefore, to the extent that our previous opinion could be read to allow *Hughes* to permit the forfeiture of a vehicle involved in the casual exchange of a controlled substance, it is withdrawn.

It should also be noted that the Tennessee Supreme Court, in *Stuart v. State of Tennessee, Department of Safety*, 963 S.W.2d 28 (Tenn. 1998), considered the General Assembly’s intent when enacting Tenn. Code Ann. § 53-11-451(a)(4)(C).³

Finally, we note that Tennessee's forfeiture statutes embrace the

¹ Forfeitures are not favored by the law, and statutes authorizing such action are to be strictly construed. See *Redd v. Department of Safety*, 895 S.W.2d 332, 335 (Tenn. 1995).

² The request noted that *Hughes* is listed in the “Notes to Decisions” section of the Tennessee Code Annotated § 39-17-418. Its placement there is irrelevant to this analysis. The insertion of annotations is the province of the Tennessee Code Commission. Tenn. Code Ann. §§ 1-1-105(a); 1-1-106(a). The General Assembly does not insert such annotations into the Code, and only the text of the statute itself is evidence of the statutory law of the state. Tenn. Code Ann. § 1-1-111(b) (“The text of the statutes, codes and code supplements (but not the annotations, footnotes and other editorial matter) appearing in the printed copies of the compilation, containing a copy of the commission's certificate of approval, shall constitute prima facie evidence of the statutory law of the state of Tennessee. . .”).

³ The *Stuart* case centered on the application of the 5th Amendment's prohibition of double jeopardy and the 8th Amendment's excessive fines clause to forfeiture cases in Tennessee.

proportionality approach. Under Tenn. Code Ann. § 53-11-451(a)(4)(C) (Supp. 1997), the simple possession of a small amount of drugs or drug paraphernalia *cannot* trigger a forfeiture action. Apparently, the legislature has determined that forfeiture would be disproportionate to those crimes.

Id. at 35 (emphasis added).

While it may be argued that this is merely *dictum*, it is, nonetheless, an indication of the Supreme Court's view of the statute and the exception it creates. The Court clearly states that simple possession cannot result in a forfeiture action. The Court goes further by indicating its understanding of legislative intent - that the forfeiture of a vehicle for simple possession would be disproportionate to the offense committed. As the "casual exchange" of a controlled substance is also referred to in Tenn. Code Ann. § 53-11-451(a)(4)(C), forfeiture of a vehicle for that offense would also be disproportionate to the crime committed.

The Court in *Stuart* examined federal as well as state case law when reaching its conclusions. Many of these cases were decided well after *Hughes*. See, e.g., *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), *United States v. 11869 Westshore Drive*, 70 F.3d 923, (6th Cir. 1995), *cert. denied*, 519 U.S. 811, 117 S. Ct. 57, 136 L. Ed. 2d 20 (1996).

Given the Supreme Court's language in *Stuart*, the statute must be interpreted in light of the excessive fines prohibition in the Eighth Amendment to the United States Constitution and Article 1, § 16, of the Tennessee Constitution. A violation of Tenn. Code Ann. § 39-17-418 is a Class A misdemeanor. Tenn. Code Ann. § 39-17-418(c). The maximum punishment for a Class A misdemeanor is eleven (11) months and twenty-nine (29) days confinement or a fine of two thousand five hundred dollars (\$2,500) or both. Tenn. Code Ann. § 40-35-111(e)(1). In contrast, when a vehicle is seized at the scene, its monetary value could be well over the maximum fine.

It is a well-settled rule of statutory construction that statutes must, in case of any ambiguity, be construed to accord with constitutional requirements. Construction of Tenn. Code Ann. § 53-11-451(a)(4)(C) as exempting the forfeiture of conveyances used to facilitate a casual exchange of controlled substances would avoid the constitutional issue examined above.

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